STATE ENGINEER WORKSHOP TO CONSIDER
LEGISLATURE'S MOTION TO EXPRESS LEGISLATIVE INTENT

POINTS SUBMITTED BY NV ENERGY FOR CONSIDERATION

- NV Energy is a public utility providing energy services and products to 2.4 million people throughout the state, and thus holds an extensive water resource portfolio to supply water to existing and future power generation facilities. NV Energy engages in long range planning for expansion of existing and construction of new facilities, and thus holds numerous applications for water rights for operation of those future and expanded facilities.

- In the wake of the Nevada Supreme Court's ruling in *Great Basin Water Network, et al., v. State Eng'r, et al.*, 126 Nev. ___, 222 P.3d 665 (Adv. Opn. 2, January 28, 2010), NV Energy has concerns over the impact of the court's ruling upon our pending applications and believes a legislative solution needs to be crafted. However, we would caution against the hasty crafting of any amendment to protect against unintended consequences which could result if the amendment is rejected by the Legislature or has impacts which are not anticipated.

- The Legislature has directed the State Engineer to consider four issues in recommending that specific legislation be enacted: (1) protection of existing water rights, (2) status of pending applications, (3) preservation of priorities, and (4) applications of the protest period provisions.

- To that end, NV Energy posits that whatever legislative solution is ultimately recommended, that such solution not require the re-filing of affected applications. The preservation of priority is of vital importance. Also, the voiding of applications is not contemplated by the statutory water scheme and would be a punitive act against applicants. Moreover, there is ample court authority for the proposition that an administrative agency is not divested of its authority to act on a matter before it due to the agency's failure to comply with statutory deadlines, especially when important public rights, such as preservation of priority, are at issue. These legal principles are discussed at length in NV Energy's amicus brief filed in support of SNWA's petition for rehearing in the *Great Basin Water Network* litigation, which is submitted to the State Engineer as Exhibit 1 to Points.

- NV Energy believes there are two relatively simple solutions available to address the four concerns identified by the Legislature:

  1. The Legislature can amend the transitory provisions of the 2003 amendment to NRS 533.370, Senate Bill 336, section 18, to make it very clear that the amendment is intended to apply retroactively to all applications on file with the State Engineer since 1947. NV Energy posits that this is the "cleanest" way to deal with the retroactive application issue, which we believe would be approved by the Legislative Counsel Bureau. This amendment would protect existing applications and the priority of those applications, as well as ensure that the status of existing water rights is not called into question.

2. In order to address the Court's concern of the due process rights of "subsequent" protestants, NV Energy posits that an amendment to NRS 533.370(8) be made to re-notice applications that have not been acted on within a certain amount of time and re-open the protest period on those applications. Any such amendment should apply to all applications, not just certain interbasin transfer applications. Also, NV Energy submits that the re-noticing of applications and re-opening of the protest period must only be triggered at the time that the State Engineer is ready to take action on any given application.

SUBMITTED this 16th day of March, 2010.

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Exhibit 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREAT BASIN WATER NETWORK, a nonprofit organization; *et al.*,

Appellants,

vs.

TRACY TAYLOR, in his official capacity as the Nevada State Engineer; *et al.*,

Respondents.

No. 49718

ON APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA
District Court Case No. CV0608119

BRIEF OF *AMICUS CURIAE* NV ENERGY

In Support of Southern Nevada Water Authority's
PETITION FOR REHEARING

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IN THE SUPREME COURT OF THE STATE OF NEVADA

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INTRODUCTION

NV Energy,[1] is a public utility company regulated by the Public Utilities Commission and supplies energy services and products to over 2.4 million Nevadans. As such, NV Energy holds an extensive portfolio of water resources, including permitted and certificated water rights throughout the State that are used to supply water to its existing power generation facilities. Request for Judicial Notice (RJN) Exs. 1-2. In order to continue to meet the electricity needs of current and future Nevada residents, NV Energy engages in long range planning for construction of future power generation facilities and the expansion of existing facilities. This long range planning necessarily encompasses ensuring that the contemplated expanded and future facilities will have the requisite water resources for their construction and operation. Accordingly, NV Energy has filed or acquired applications for new appropriations of water to secure water supplies for those facilities. RJN, Exs. 1-2. Many of those applications have not been acted on by the State Engineer within the one-year time frame set forth in NRS 533.370(2) and are not subject to any exception under that statute.

NV Energy submits this *amicus curiae* brief in support of Respondent Southern Nevada Water Authority (SNWA) to inform this Court of the unintended ramifications its decision could have upon Nevada's prior appropriation water right scheme, and resulting impact upon NV Energy and the citizens of Nevada. In light of the governing statutes and this Court's well established water law precedent, NV Energy urges this Court to affirm the validity of SNWA's applications and direct that the appropriate consequence of the State Engineer not acting on SNWA's applications within the statutorily prescribed time frame is the re-noticing of those applications and the re-opening of the protest period.

PETITION FOR REHEARING STANDARD

NRAP 40(a)(1) provides that a "petition shall state briefly and with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present." This Court may consider rehearings . . . [w]hen the court has overlooked, misapplied or failed to consider a statute . . . or decision directly controlling a dispositive issue in the case." NRAP 40(c)(2)(ii).

[1] As mentioned in NV Energy's motion for leave to file this brief, this brief is submitted on behalf of Sierra Pacific Power Company and Nevada Power Company, both doing business as NV Energy. For ease of reference, these two entities are hereinafter together referred to as NV Energy.

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I. This Court's Opinion.

In *Great Basin Water Network, et al., v. State Eng'r, et al,* 126 Nev. ___, 222 P.3d 665 (Adv. Opn. 2 at 3, January 28, 2010), this Court concluded that the State Engineer had violated his statutory duty by failing to take action on SNWA's 1989 applications within one year after the final protest date as required by NRS 533.370(2) and that none of the exceptions set forth in that statute applied to SNWA's 1989 applications. *Id.* at ___, 222 P.3d at 669-70 (Adv. Opn. 2 at 8-10). This Court then found that the 2003 amendment to NRS 533.370 exempting municipal use from the one-year time frame did not apply retroactively to SNWA's 1989 applications.[2] *Id.* at ___, 222 P.3d at 670-71, (Adv. Opn. 2 at 11-15).

In attempting to determine what the consequence should be for the State Engineer's failure to act, this Court was concerned about the respective inequities to applicants and "original and subsequent protestants":

> [v]oiding the State Engineer's ruling and preventing him from taking further action would be inequitable to SNWA and future similarly situated applicants. And applicants cannot be punished for the State Engineer's failure to follow his statutory duty. Similarly, it would be inequitable to the original and subsequent protestants to conclude that the State Engineer's failure to take action results in approval of the applications over 14 years after their protests were filed.

Id. at ___, 222 P.3d at 672, (Adv. Opn. 2 at 15-16). Thus, this Court remanded the matter back to the district court with instruction for that court to determine whether new applications must be filed or whether the State Engineer must re-notice the original applications and re-open the protest period. 126 Nev. at ___, 222 P.3d at 667, 672 (Adv. Opn. 2 at 4, 16).

II. Granting the Request for Rehearing is Appropriate Because this Court Overlooked and Failed to Apply Governing Law.

In its opinion, this Court made the decision not to craft a remedy and ordered the district court to determine whether or not new applications must be filed. In doing so, this Court inadvertently overlooked and failed to consider Nevada's prior appropriation doctrine, which is

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[2] The 2003 amendment also amended the statute to include what is now subsection 4, which provides that "[i]f the State Engineer does not act upon an application within 1 year after the final date for filing a protest, the application remains active until acted upon by the State Engineer." *See* 2003 Nev. Stat. 2980-81. This subsection was not addressed by this Court in its opinion.

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grounded on principles of priority, *i.e.*, the commonly held precept of "first in time is first in right." *See United States v. Hennen*, 300 F. Supp. 256, 261 (D. Nev. 1968) (*quoting* Senator McCarran's Senate Report No. 755, 82nd Congress, 1st Session, p.2). The rights of the users of a water system are dictated by the relative priorities of their rights. *In re Application of Filippini*, 66 Nev. 17, 30, 202 P.2d 535, 541 (1949). For any water right established after the enactment of Nevada's comprehensive water code,[3] the priority is determined by the date of the filing of the application to appropriate water. *See* NRS 533.355(1),(2); NRS 534.080(3). Requiring the filing of new applications undermines the fundamental precept of Nevada water law that "first in time is first in right," as established by the Court's well settled water rights jurisprudence and codified by Nevada's Legislature. It also punishes the applicant for the agency's inaction in contradiction of United States Supreme Court and this Court's precedent.

Therefore, NV Energy urges this Court to grant SNWA's petition for rehearing on the limited basis that this Court overlooked or failed to consider dispositive legal authority. Upon consideration of the governing decisions and statutes discussed herein, this Court will be able to make the fully informed decision that the appropriate consequence of the State Engineer's failure to act is the re-noticing of applications and re-opening of the protest period. In fact, this is the remedy originally sought by the Appellants in this case. Open. Br. at 29. This is the only result that will comport with precedent and address this Court's concern that the "original and subsequent protestants" have a right to be heard, without unduly penalizing SNWA and other similarly situated applicants and disturbing Nevada's well settled prior appropriation doctrine.

ARGUMENT

I. Nevada is a Prior Appropriation State, Where Priority Governs the Relative Rights of Water Users.

"The doctrine that a prior appropriation constitutes a prior right has long since been adhered to in the jurisdictions embraced within the arid and semiarid region of this country[.]" *Prosole v.*

[3] In 1913, Nevada's comprehensive statutory water code was enacted. 1913 Nev. Stat. 192. Water rights established prior to that time are "vested," with a priority date established as of the date that the water was placed to beneficial use. *Ormsby County v. Kearney*, 37 Nev. 314, 352-53, 142 P. 803, 810 (1914).

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Steamboat Canal Co., 37 Nev. 154, 160, 140 P. 720, 722 (1914) (McCarran, J.).[4] In 1889, this Court definitively determined that the right to use water in the State of Nevada was governed by prior appropriation. *Reno Smelting, Milling and Reduction Works v. Stevenson*, 20 Nev. 269, 282, 21 P. 317, 321-22 (1889) (right to use water in Nevada is governed by "principles of prior appropriation," as the "common-law doctrine of riparian rights is unsuited to the [arid] condition of our state"), *cited In In re Application of Filippini*, 66 Nev. at 22, 202 P.2d at 537 ("doctrine of prior appropriation is settled law of this state"); *see also Desert Irrigation, Ltd. v. State of Nevada*, 113 Nev. 1049, 1051 n.1, 944 P.2d 835, 837 n.1 (1997) ("Nevada, like most western states, is a prior appropriation state").

The importance of being "first in time" is demonstrated in times of water shortage where the priority of rights dictates who will receive water and who will not. In other words, the holders of junior rights will be cut off from their water to protect the rights of senior users. *See Ophir Silver Mining Co. v. Carpenter*, 4 Nev. 534, 543 (1869) ("priority of appropriation gives the superior right"); NRS 534.110(6) (if the State Engineer determines that a hydrographic groundwater basin is over-appropriated and there is not enough water to serve the needs of all ground water right holders, he "may order that withdrawals be restricted to conform to priority rights"); *see also* NRS 533.075 (may rotate use of water on land, so long as it is done "without injury to lands enjoying an earlier priority").

The priority of any statutorily-acquired water right is determined by the date of the filing of a water right application. NRS 533.355(1),(2); NRS 534.080(3). The filing of the application is the "first step" to be taken to acquire the right to use water under Nevada's statutory water scheme. *See In re Application of Filippini*, 66 Nev. at 25-26, 202 P.2d at 538-39 ("appropriation is a method of acquiring a right to the use of waters from the government"); *Ophir Mining Co.*, 4 Nev. at 543-44, *quoted in Bailey v. State of Nevada*, 95 Nev. 378, 384, 594 P.2d 734, 738 (1979) ("'the appropriation

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[4] As early as 1866, this Court had recognized prior appropriation as one of two doctrines that form the basis upon which to establish the right to use water. *See Lobdell v. Simpson*, 2 Nev. 274, 278-79 (1866). The other, the "riparian doctrine," is based on the theory that the right to reasonably use water arises by virtue of the ownership of land which water flows upon or abuts. *See id.* at 276-77.

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is not deemed complete until the actual diversion or use of the water, . . . the right relates to the time when the first step was taken to secure it'").[5]

If the application is approved, the permitting and certificating of the water right relates back to the filing date of the application. *Bailey*, 95 Nev. at 384, 594 P.2d at 738; NRS 534.080(3); *see also United States v. Alpine Land & Reservoir*, 27 F. Supp. 2d 1230, 1240 (D. Nev. 1998) (the right relates back to the "first step" taken to secure that right); NRS 533.370(7) (permit approval noted on original application, which sets forth filing, *i.e.*, priority, date); NRS 533.425(1)(b) (certificate must indicate date of "appropriation"). The approval of an application to change the manner of use, place of use, and/or the point of diversion of a water right, whether permitted or certificated, also relates back to the date of filing of the base application. *See generally United States v. Alpine Land & Reservoir Co.*, 291 F.3d 1062 (9th Cir. 2001); NRS 533.040(2) (priority of the right remains undisturbed even if the water right is severed from the land to which it was originally appurtenant and transferred to another place of use).

There can be no doubt that the value of an application is driven by its priority.[6] Declaring applications that the State Engineer has not acted upon within the one year time period of NRS 533.370(2) void would summarily strip those holding such applications of that value. Any new, or substitute, applications filed by such divested holders will have a later priority date, thus relegating any water rights approved under those new applications to a status junior to any other water right for which an application was filed and approved in the interim. Such an outcome is clearly not contemplated by Nevada water law.

The importance of priority of water rights in Nevada, the most arid state in this nation,[7] cannot be overemphasized; it is the key to the administration, determination, and valuation of the relative water rights of users of a water system. Thus, this Court is urged to direct the re-noticing

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[5] Even if an application is returned to the applicant for correction, it retains the priority date of the initial filing. *See* NRS 533.355 (2).

[6] An application is property which can be conveyed. *See* NRS 533.382.

[7] "Nevada has, on the average, less precipitation than any other State in the Union." *Nevada v. United States*, 463 U.S. 110, 114 (1983).

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of SNWA's applications and re-opening of the protest period on those applications. This is an appropriate result that comports with the doctrine of prior appropriation and preserves the priorities of applications.

II. Voiding of Applications and Requiring New Filings Would Be a Punitive Act Against Applicants That Is Not Contemplated by Nevada's Statutory Scheme.

Requiring SNWA to file new applications will act as a forfeiture of the original applications' priority.[8] Aside from running counter to the doctrine of prior appropriation, this result is simply not contemplated by NRS 533.370 or any of the related statutes governing applications to appropriate water. "[I]t is the duty of this court, when possible, to interpret provisions within a common statutory scheme 'harmoniously with one another in accordance with the general purpose of those statutes' and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent." *Southern Nev. Homebuilders Ass'n v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005) (*quoting Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001)).

The Nevada Legislature has specified when an application for water rights may be cancelled. Upon receipt of an application, the State Engineer examines the application to determine whether or not it is in the proper form. NRS 533.355(2). If it is not, the State Engineer's office returns it to the applicant for completion or correction. *Id.* If the applicant does not return it within 60 days, the State Engineer is required to cancel the application. *Id.*

The Legislature has also enacted very specific provisions regarding the loss of water rights. *See* NRS 533.390(2) (cancellation of permit for failure to file statement of completion of work); NRS 533.395 (permit may be cancelled due to failure of holder to perfect the application in good faith and with reasonable diligence); NRS 533.410 (cancellation of permit for failure to file proof of beneficial use); *see also* NRS 533.060 (surface water rights can be declared abandoned under specific circumstances); NRS 534.090 (ground water rights may be lost by forfeiture if not used for more than 5 consecutive years or by abandonment). Reading these statutes together, it is clear that

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[8] "[T]he law abhors a forfeiture." *Mainor v. Nault*, 120 Nev. 750, 776, 101 P.3d 308, 326 (2004).

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the Legislature only contemplates the cancellation of an application or loss of a water right due to the *holder's* lack of diligence, not the State Engineer's.

Also, unlike the specific cancellation, forfeiture and abandonment provisions set forth above, the Legislature did not provide for any consequence to the applicant for the State Engineer's failure to act within the time frame of NRS 533.370(2). The Legislature's "silence" in this regard is further evidence of the Legislature's intent that cancellation or voiding of such applications is not contemplated. *See Binegar v. Eighth Judicial Dist. Court*, 112 Nev. 544, 549, 915 P.2d 893, 899 (1996) (when the Legislature could have put limiting language in a statute but chose not to do so, it must be presumed that it was the intent of the Legislature not to do so).

III. Agencies Do Not Lose the Authority to Act on a Matter Due to the Agency's Failure to Comply with Statutory Deadlines.

The U.S. Supreme Court has made it clear that an administrative agency does not lose authority to act on a matter before it due to its failure to comply with express statutory time limits, unless the governing statute specifies a consequence for failure to comply with the timing provision. *Brock v. Pierce County*, 476 U.S. 253, 259 (1986); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003). Indeed, courts should be "most reluctant to conclude that every failure of an agency to observe a procedural requirement voids subsequent agency action, especially when important public rights are at stake." *Brock*, 476 U.S. at 260. Preventing an agency from acting when no statutorily specified consequence exists, would be contrary to the "'great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided.'" *Id.* (*quoting United States v. Nashville, C. & St. L. R. Co.*, 118 U.S. 120, 125 (1886)).

In *Brock*, a county in the State of Washington had received money from a grant funded by the Comprehensive Employment and Training Act (CETA). 476 U.S. at 256. Because CETA required the Secretary of Labor to issue a final determination as to the misuse of CETA funds by a grant recipient within 120 days after receiving a complaint about such alleged misuse, and the Secretary did not do so until after the 120 days, the county argued that the Secretary of Labor could not compel the county to make repayment of the funds it had received. *Id.* at 257. The Court was

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not persuaded by the proposition that the plain meaning of the statutory command that the Secretary "shall" take action within 120 days conclusively demonstrated that Congress intended to bar any action by the Secretary after that period had expired. *Id.* at 258. To the contrary, the Court held that it cannot be assumed that a legislative body intended to divest an agency of its power to act when there is no specific consequence for the agency's failure to act set forth in statute. *Id.* at 266. The Court found that CETA's requirement that the Secretary "shall" take action within 120 days did not, standing alone, prohibit the Secretary from acting after that time. *Id.* Rather, the 120-day provision was meant "to spur the Secretary to action, not to limit the scope of his authority," so that untimely action was still valid. *Id.* at 265.

The Supreme Court reiterated its reasoning in *Barnhart*, which involved the failure of the Commissioner of Social Security to take timely action relating to health care benefits for retirees of the coal industry. 537 U.S. at 152-54. In that case, various labor agreements between coal operators and a union concerning health care benefits culminated in the congressional enactment of the Coal Industry Retiree Health Benefit Act of 1992 ("Coal Act"). *Id.* One provision of the Coal Act provided that the Commissioner "shall, before October 1, 1993," assign each retiree to an extant operating company or related entity which would then be responsible for funding the assigned retiree's benefits. *Id.* However, untimely assignments were made which were subsequently challenged by the operating companies to whom the beneficiaries were assigned. *Id.* Nonetheless, the Court held that the Commissioner had acted within his authority in making those assignments despite the fact that they were made outside the statutorily prescribed time period. *Id.* at 164.

Relying on its previous decision in *Brock*, the *Barnhart* court again rejected the argument that the term "shall," together with a specific deadline, leaves an agency without power to act after that deadline. *Id.* at 158. As the Court emphasized, not "since *Brock*, have we ever construed a provision that the Government 'shall' act within a specified time, without more, as a jurisdictional limit precluding action later." *Id.*. "We have summed it up this way: 'if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction.'" *Id.* at 159 (*quoting United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993)).

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The reasoning set forth in *Brock* has been followed by Circuit courts and state courts alike. *See Tadlock v. United States Dep't of Defense*, 91 F.3d 1335 (9th Cir. 1996) (agency's failure to comply with three different mandatory statutory deadlines in a whistle-blower action did not bar subsequent agency action); *Southwestern Bell Tel. Co. v. Federal Communications Comm'n*, 138 F.3d 746 (8th Cir. 1998) (agency retained power to act in determining the legality of proposed tariffs, even though statute required action within five months and the agency took nine years); *Hendrickson v. Fed. Deposit Ins. Corp.*, 113 F.3d 98 (7th Cir. 1997) (agency authorized to remove bank officer after 90-day statutory deadline for removal decision); *Southwestern Pennsylvania Growth Alliance v. Browner*, 121 F.3d 106 (3d Cir. 1997) (agency has power to act after 18-month statutory deadline and can consider data applicable to post-deadline period); *Alaska v. Johnson*, 958 P.2d 440 (Alaska 1998) (holding that a court should not, and cannot, invent remedies to satisfy some perceived need to coerce the courts and government into complying with statutory time limits); *Mills v. Martinez*, 909 So. 2d 340 (Fla. Dist. Ct. 2005) (holding that procedural rules, such as specific statutory timing requirements, should be given a construction calculated to further justice, not to frustrate it).

Moreover, this Court in *Village League to Save Incline Assets, Inc. v. Nevada*, 124 Nev. ___, 194 P.3d 1254 (Adv. Opn. 90, October 30, 2008), held that the Nevada State Board of Equalization (Board) was not divested of its authority to act after the statutory deadline established for completion of equalization decisions. This Court's analysis of the issue centered upon the determination of whether or not the statutory deadline was "mandatory" or "directory." *Id.* at ___, 194 P.3d at 1259-60 (Adv. Opn. 90 at 6-9). While the decision was not founded upon *Brock* or its progeny, the Court noted that the Legislature did not impose a penalty for non-compliance. *Id.* at ___, 194 P.3d at 1260 n.20 (Adv. Opn. 90 at 7 n.20) (*quoting Corbett v. Bradley*, 7 Nev. 106, 108 (1871) ("'[i]f it be clear that no penalty was intended to be imposed for non-compliance, then, as a matter of course, it is but carrying out the will of the legislature to declare the statute . . . to be simply directory'")). This Court also took into account that the Board "might not have adequate time" to consider any appeal of taxpayers contesting their assessments, and held that "[t]his court may construe a statute as directory to prevent 'harsh, unfair or absurd consequences.'" *Id.* at ___, 194 P.3d at 1260-61 (Adv. Opn 90 at 7-9) (internal citation omitted). Thus, after review of the statute at hand and related statutes, this

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Court determined that the word "shall" in the statute setting forth the deadline by which the Board must issue equalization decisions, was directory, not mandatory, and concluded the Board was within its authority to act outside of the statutory time period. *Id.*

The foregoing cases amply demonstrate that if no consequence is expressly provided for in statute for an agency's failure to act within a prescribed time, the agency is not prohibited from acting beyond the statutory time period. As discussed *supra*, there is no statutory language in NRS Chapter 533 specifying any consequence for the State Engineer's failure to approve or deny an application to appropriate water within the statutory time period of NRS 533.370(2). Moreover, as a practical matter, as alluded to by SNWA in its Answering Brief, the State Engineer was unable to act on the 1989 applications within the statutory time period. Ans. B. at 18-19. Requiring SNWA to file new applications would effectively divest the State Engineer of his authority to act on the applications solely because he has run beyond the timeline set forth in statute and would penalize SNWA for that inaction. Such an effect would clearly be inconsistent with the holdings set forth in the cases above because it would prejudice the interests of public citizens due to the inaction of the officer to whose care their interests were entrusted.

Further, as in *Brock*, the instant case involves important public rights in preserving the doctrine of prior appropriation and the priority of applications held by SNWA and other similarly situated applicants, such as NV Energy. Any decision that allows for the potential abrogation of those rights, which are essential to the administration of Nevada's water rights scheme, runs afoul of the firmly established doctrine that a party must not be harmed when an agency does not act in a timely manner through no fault of that party.[9]

In sum, these decisions provide more direction to this Court to enable it to resolve its present quandary. SNWA cannot be required to file new applications as a result of the State Engineer not approving or denying its 1989 applications within one year of the close of the protest period.

[9] Significantly, not one of the cases discussed above includes a decision whereby the court determined the proper recourse was to instruct an innocent party to restart the entire administrative process due to the agency's failure to abide by a statutorily prescribed timeline. Nor did any of the cases divest the agency of its authority to act past the statutory time period.

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CONCLUSION

For the foregoing reasons, this Court should grant SNWA's petition for rehearing to clarify that SNWA's applications are not void and to direct the re-noticing of the applications and re-opening of the protest period.

RESPECTFULLY SUBMITTED this 15th day of March, 2010.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read the foregoing brief and that, to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that the brief complies with all applicable provisions of the Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the memorandum regarding matters in the record to be supported by appropriate references to the record. I understand that I may be subject to sanctions in the event that this memorandum is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 15th day of March, 2010

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Nevada Rules of Appellate Procedure, I hereby certify that I am an employee of the law firm Dyer, Lawrence, Penrose, Flaherty, Donaldson & Prunty and that on this 15th day of March, 2010, I caused a true and correct copy of the foregoing *BRIEF OF AMICUS CURIAE* to be mailed, with first-class postage thereon prepaid to the following persons:

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